Supreme Court, U.S.
FILED
DEC - 6 1993
OFFICE OF THE CLERK

(3)

No. 93-412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY S. PARKER
3401 North Fairfax Drive
Arlington, Virginia 22201
(703) 993-8055

Counsel for Petitioner
David M. Dale

December 6, 1993

BEST AVAILABLE COPY

13 PP

Table of Contents

I. Fourth Amendment Issues 2

A. Lack of Particularity in the Warrant 2

1. The Warrant on its Face. 3

2. "Cure" by Reference to the Affidavit 4

3. The *Leon* Exception to the Exclusionary Rule 5

B. The *Franks* Hearing 5

II. Admissibility of Sound Recordings 6

A. The Relaibility Threshold 6

B. The Absence of a Preliminary Finding 7

III. Federal Criminal Law Issues 8

IV. Remaining Issues 9

Table of Authorities

Cases

Cage v. Louisiana, 498 U.S. 39 (1990) 9

Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747 (9th Cir. 1989) 4

Franks v. Delaware, 438 U.S. 154 (1978) 2,5

United States v. Gahagan, 865 F.2d 1490 (6th Cir. 1989) ... 3

United States v. King, 587 F.2d 956 (9th Cir. 1978) 7

Leary v. United States, 846 F.2d 592 (10th Cir. 1988) 4

United States v. Leon, 468 U.S. 897 (1984) 5

United States v. Luk, 859 F.2d 667 (9th Cir. 1988) 4

United States v. Maxwell, 920 F.2d 1028 (D.C. Cir. 1990) .. 4

Rickert v. Sweeneyy, 813 F.2d 907 (8th Cir. 1987) 4

United States v. Sandoval, 709 F.2d 1553 (D.C. Cir. 1983).. 7

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982).. 4

Statutes and Rules

18 U.S.C. §371 8

Fed. R. Evid. 104, 901 6-7

Supreme Court Rule 10 2

Secondary Authorities

2 W. LaFave, Search and Seizure §4.6(a)(2d ed. 1987)..... 3

J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 901(b)(5)[02] (1991) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-412

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

On November 23, 1993, the Solicitor General filed a very unusual brief in opposition to Petitioner David M. Dale's petition for certiorari in this case, which had been filed on September 14, 1993. The Government's lengthy brief in opposition not only contains unnecessary repetitions of the questions and the case,[1] but also devotes most of its discussion to arguing that the court of appeals' decision was correct on the merits. Those arguments largely are premature at this stage of the proceedings. When this Court grants review, the issues will be fully briefed and argued on the merits. At this stage, the Court is looking for guidance from the parties on the exercise of its discretionary jurisdiction, in accordance

---

[1] The Government's brief consumes 11 pages in re-stating the case (Opp.1-11), but we are unable to detect any particular in which the Government's statement materially differs from the statement in the Petition (Pet.1-11). Furthermore, in no instance did we note even an allegation by the Government that the Petitioner has misstated any aspect of the record here.

with the Court's Rule 10. On this dimension, the Government's brief is deficient and in certain respects misleading as to the state of the record and of the authorities. Accordingly, we direct ourselves to those points in reply:

I. Fourth Amendment Issues

The Petition presents two questions under the Fourth Amendment: (1) whether an unconstitutionally general warrant can be cured by reference to an underlying affidavit that did not accompany the warrant at the search, merely because the affiant was present; and (2) whether the courts below correctly applied this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978). The Government does not deny the importance of these questions, or the regularity with which they arise in the lower courts; nor does the Government argue that any prior decisions of this Court control the case here. Rather, the Government's principal arguments are: (1) that the particularity issue "does not implicate a square conflict among the circuits" (Opp.12); and (2) that the *Franks* issue does not warrant review because it is "fact-bound" (Opp.17).

In both instances, the Government's argument is demonstrably wrong, and the Court need not take the Petitioner's word for that fact. The courts of appeals themselves--including the decision below in this case--have recognized and commented upon the conflict over the circumstances in which an affidavit will be permitted to substitute for the Fourth Amendment's requirement of particularity in the warrant. The decision below also contradicts the Government's argument here on the *Franks* issue, by expressly framing its holding as a question of law--and therefore not "fact-bound"--in order to avoid yet another conflict among circuits on the applicable standard of review (*see* a39n.44).[2]

A. Lack of Particularity in the Warrant

The Government flatly misstates the record in this case in arguing that "[t]he court of appeals correctly sustained the district court's finding that the warrant in this case was sufficiently particular"

---

[2] Citations to "a-" are to pages of the appendix to the Petition in this Court. Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

(Opp.11). As the record plainly shows, and the Government elsewhere acknowledges (*id.* 9), in fact the court of appeals specifically and explicitly reversed the district court's ruling on this point, and held "the warrant, by itself, was not sufficiently particular" (a44-45).[3] In addition to that misstatement, the Government's presentation on the particularity question is deficient both in its analysis of the question and in its treatment of the authorities.

The Government's presentation confuses three separate issues, all of which might be deemed included in the particularity question presented by the Petition, but each of which requires separate and distinct consideration: (1) whether the Fourth Amendment's particularity requirement can ever be satisfied outside of the warrant itself; (2) if so, under what circumstances; and (3) if the Fourth Amendment is violated, whether the exclusionary rule is applicable.[4]

1. The Warrant on its Face. This Court has never authoritatively approved even the basic idea that the Fourth Amendment's particularity requirement can be satisfied outside of the warrant itself, and the Government does not argue otherwise. This threshold issue alone would justify review in this Court, as it obviously presents an important issue of federal constitutional law that has not been, but should be, settled by this Court. Although there is no question that the weight of lower court authority favors this proposition, it is not monolithic, *see* 2 W. LaFave, *Search and Seizure* § 4.6(a) n.28 (2d ed. 1987). It is especially for this Court to decide the fundamental requirements of the Fourth Amendment, and this question deserves the Court's attention.

---

[3] The Government may wish to argue that the court of appeals decision is in error on this point. If so, it should have cross-petitioned. As it stands, the Government's presentation is misleading.

[4] The Government's confusion here is not unique. A similar confusion was presented in the related context of particularity in specifying the place to be searched, and resolved by the court's analysis into these three issues, in *Gahagan v. United States*, 865 F.2d 1490 (6th Cir. 1989); *see also United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990).

2. "Cure" by Reference to the Affidavit. As this Court has not decided the fundamental question, it also has not established any guidelines for the use of affidavits to "cure" a deficiency on the face of the warrant. Contrary to the Government's argument here, there is a deep and continuing conflict among the circuits over the conditions under which an affidavit will "cure" the warrant's description. Indeed, the courts of appeals would be very surprised by the Government's argument, as those courts themselves have recognized and commented upon the conflict among circuits. For example, in *Leary v. United States*, 846 F.2d 592 (10th Cir. 1988), the Tenth Circuit said that "[w]e do not follow the more relaxed rule discussed by the Eleventh Circuit in *United States v. Wuagneux*," *id.* at 603n.20. *Waugneux*, however, was cited and followed by the Eighth Circuit in *Rickert v. Sweeney*, 813 F.2d 907 (8th Cir. 1987), which enunciated the rule that "[a]n affidavit may provide the necessary particularity for a warrant if it is *either* incorporated into *or* attached to the warrant . . . [and] also . . . if the affidavit is merely present at the search." *Id.* at 909 (emphasis added). But the Ninth Circuit, citing *Leary* with approval, states the same requirement as that "the affidavit is attached to *and* incorporated by reference in the warrant." *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (9th Cir. 1989); *see also United States v. Luk*, 859 F.2d 667, 676 & n.8 (9th Cir. 1988)(stating the same rule as "the law of our circuit" and commenting that "other circuits have applied these criteria less rigidly" (citing 5th, 8th, and 11th Circuit cases).

Prior to the decision below in this case, the D.C. Circuit also commented upon the conflict explicitly, in *United States v. Maxwell*, 920 F.2d 1028, 1032 & n.2 (D.C. Cir. 1990), placing itself in the strict attachment plus incorporation category rather than the "relaxed construction" attributed to the 6th and 11th Circuits. However, by its decision below here, the D.C. Circuit has shifted into the "relaxed" category (*see* a47 (citing and relying upon the Eighth Circuit's Rickert v. Sweeney decision)). The courts of appeals certainly believe that their different rules are in conflict.

That conflict is well-developed, nearly evenly divides the circuits, is based upon a difference of principle, and is important (see Pet.12-14). Review by this Court is justified on any of these grounds.

3. The *Leon* Exception to the Exclusionary Rule. The last of the three branches of the particularity question was not even reached by the decision below (*see* a43-49), and yet it forms the bulk of the Fourth Amendment discussion in the Government's brief in this Court (Opp.13-17). The Government's discussion largely is beside the point, not only as a premature address to the merits, but also as debating an argument--that the *Leon* exception is "automatically inapplicable" (Opp.15)--that Petitioner does not advance.

To the extent that the Government's argument is an invitation to use the *Leon* exception as a substitute for deciding the Fourth Amendment issues in this case, the argument should be rejected as unsound and inconsistent with this Court's responsibility to construe the Constitution. Before reaching the *Leon* exception, this or any other Court first must decide whether the Constitution otherwise has been violated.

If the *Leon* question is reached, then the Government's extended struggle with *Leon* in this context serves only to reinforce the case for review in this Court. As the Petition points out (*see* Pet.13-14), the lower courts themselves are grappling with the obvious incongruity of applying the Leon standard of objectively reasonable behavior in the context of the particularity requirement. Outside of an application like *Sheppard*, where the officers essentially were excused by their reliance on a magistrate's assurances, it is indeed difficult to conceive of a situation in which officers could behave reasonably while executing a facially defective warrant. This factor provides yet another reason favoring review here, in order to clarify the limitation of *Leon* to instances where the warrant is not "so facially defective" as to preclude reasonable reliance by the officers.

B. The *Franks* Hearing

The Government's argument that the lower courts' denial of a *Franks* hearing does not warrant review because it is "fact-bound" (Opp.17) again misstates the court of appeals' decision below, which was explicitly framed as a question of law in order to avoid another circuit conflict on the applicable standard of review (a39-40 & n.44). Under the actual posture of the case, it is the ideal vehicle for this Court's review, because it presents the most extreme, limiting case of the *Franks* principle: the unchallenged defense

showing is that any effort whatsoever by the investigating agent would have revealed the falsity of the allegations relied upon to show probable cause (*see* Pet.14-16); and yet the court of appeals held, as a matter of law, that there had been no substantial preliminary showing of reckless disregard for truth. If *Franks* does not require an evidentiary hearing here, then no such hearing is ever required on grounds of reckless, and this aspect of *Franks* should be reconsidered by this Court.

II. Admissibility of Sound Recordings

The Petition also presents two questions concerning the threshold standard of admissibility for sound recordings. (*See* Pet.i, 17-20). The Government's brief seeks to evade the first question by relegating its treatment to footnotes only (Opp.18n.7 & 19n.8), which is always a sure sign that the advocate has no effective response. On the second question, the Government argues essentially that this Court should not enforce its prior decisions under Fed. R. Evid. 104.

A. The Reliability Threshold

The Government's footnotes pretend not to understand the doctrinal difficulties (Opp.18n.7) and deny the special problems of reliability (Opp.19n.8) created by sound recordings under the Federal Rules of Evidence. In both respects, the Government is contradicted by the pertinent decisions of the courts of appeals.

As was pointed out by the Petition, the enactment of the Federal Rules of Evidence removed the prior doctrinal basis for assessing the threshold reliability of sound recordings. As a result, there is now an open question whether sound recordings are subject only to minimal authentication requirements under Fed. R. Evid. 901, or whether a more rigorous standard of reliability is required under that rule or otherwise. The existing case law in the courts of appeals reflects a division of authority on the rigor of the threshold showing required. According to the leading treatise on the Federal Rules of Evidence, the Third and Eighth Circuits continue to follow a rigorous list of foundational requirements first established prior to the Federal Rules, while the D.C., Second, Fifth, Ninth, Tenth, and Eleventh Circuits follow a "flexible" approach. J. Weinstein & M.

Berger, *Weinstein's Evidence*, ¶ 901(b)(5)[02], at pages 901-89 through 901-92 (1991). The courts of appeals' decisions themselves recognize and discuss the conflict. *See, e.g., United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988)("we have expressly rejected [the 8th Circuit's] rigid test"); *United States v. King*, 587 F.2d 956, 960-61 (9th Cir. 1978)(discussing the differences between the 5th and 8th Circuit tests). Moreover, neither line of authority endorses the type of minimalist approach the Government advocates here.

The courts of appeals' decisions also contradict the Government's argument here that "[t]ape recordings do not present any unique problems with regard to assessment of their authenticity, accuracy, or reliability" (Opp.19n.8). In *King*, the Ninth Circuit recognized that "[m]ore so than photographs or other demonstrative evidence, sound recordings are susceptible to alterations that may be impossible to detect," 587 F.2d at 960; see also United States v. Sandoval, 709 F.2d 1553, 1554 (D.C. Cir. 1983)("tape recordings are peculiarly susceptible to undetectable adulteration and sometimes even indeliberate alteration," citing decisions of the 2d, 3d, and 5th Circuits).

Given the special nature of sound recordings, the ever-advancing technology of their creation, and their growing ubiquity in our everyday lives, the question of the question of the unsettled foundational requirements for their use as evidence in the federal courts is of sufficiently general importance to warrant this Court's review. The Government does not deny the general importance of the question, but again only argues the merits--prematurely, perfunctorily, and erroneously.

B. The Absence of a Preliminary Finding

The Government's brief does devote some text to the question present by the district court's failure to make a preliminary finding as required under Fed. R. Evid. 104, and the court of appeals' failure to correct that error (Opp.18-19). Here again, the Government seems to be arguing the merits summarily, with something approaching a "harmless error" analysis. But the pertinent consideration on certiorari is rather whether this Court needs to clarify or recast its prior decisions establishing that a

preliminary finding is required under the Rule for both conditional relevancy and other preliminary questions (*see* Pet.20). If this Court does not enforce its own decisions, they will not be followed. Nor is there any indication that the court of appeals rested its decision on a harmless error analysis. Rather, the court of appeals held that a non-finding was an "implicit" finding (a37-38), and that decision plainly is error which should be corrected, for otherwise the lower courts will have little incentive to follow the rules.

III. Federal Criminal Law Issues

The Government's brief in striking in its failure to suggest any pertinent reason militating against this Court's review of the federal criminal law issues presented by the Petition (*see* Pet.20-24). Thus, while the Government again seeks to preview the merits by arguing that the lower courts' doctrines are "settled law"(Opp.20)--in the lower courts--it does not cite any previous decisions of this Court that have approved any aspect of the huge edifice of unguided expansion of the general fraud and conspiracy statutes into the area of income tax offenses, where they may well be achieving nothing but mischief, both to individual freedoms and even to the efficient collection of revenues and enforcement of the tax laws (*see* Pet.24). The Government does not try to defend the oxymoron of a "conspiracy to attempt to evade"--one of the charged offenses here--or any of the policy implications of the case.

Instead, the Government's argument primarily is one of waiver--that certain aspects of these overarching points were waived in the court of appeals--which is not borne out by the record, and in any event is no bar to this court's review on certiorari. Aside from seeking to distinguish the Sixth Circuit's decision in *Minarik* (Opp.21-22), the Government's argument seems to be that this Court should not review the question whether 18 U.S.C. §371 should be permitted to override the distinctions of the Internal Revenue Code because this precise question was not argued in the court of appeals (*see* Opp.20n.9). However, the record shows that the question was fully preserved, first by defendant's motion to dismiss the indictment, which was the subject of a lengthy and reported opinion by the district court (a103-25), and that question was brought up by defendants' continued arguments against the

sufficiency of the conspiracy charge on appeal (*see* a50,53). Furthermore, in fact the court of appeals did decide the general question, in the course of discussing the defendants' arguments that "the Internal Revenue supplies the exclusive basis for tax fraud prosecutions" (a49) and that the multiple Internal Revenue Code counts merged together (a67-70), on which the court of appeals ruled in favor of the defendants, reversing the district court. In the latter instance, the court of appeals specifically ruled that "[t]he lesser included offense analysis . . . does not spill over to embrace prosecutions for Internal Revenue Code offenses plus offenses under other statutes" (a69n.61).

Thus, the questions are fairly presented here. They also are dramatically presented by the particular combination of charges made by the prosecutors in this case, which involves entirely an imaginary case of "tax evasion" in which no tax loss to the government was ever incurred or even threatened, and in which the charges were multiplied--and the ultimate punishment enhanced--entirely by acts of self-correction and tax *paying*, not "evasion." This bizarre inversion of rational tax law policy provides a unique opportunity for this Court to provide sensible guidance to both enforcement officials and the lower courts, by restoring a rational and effective structure of criminal tax liability rules that respects both the autonomy of the individual and the legitimate interests of the government.

IV. Remaining Issues

Limitations of time and space preclude us from providing a detailed reply to the Government's arguments concerning the reasonable doubt instruction and the sentencing issues (*see* Pet.24-26; Opp.22-27). However, two main points should be noted by the Court:

1. On the reasonable doubt question, the Court should take note that this is only one of several cases arising during the past few years concerning the application of the Court's per curiam opinion in *Cage v. Louisiana*, 498 U.S. 39 (1990). Although we believe that the instruction here plainly was deficient under *Cage*--and the Government, of course, argues the opposite--the regular recurrence of these issues suggests the need for this Court to render a fully

considered and detailed opinion on this obviously important subject.

2. On sentencing, one question simply concerns a straightforward application of Guidelines commentary (Pet.25), and the other more complex issues of multiple and retrospective punishment. The most general point rests simply on the observation that pre- and post-Guidelines sentences--even if imposed concurrently--are legally distinct and therefore multiple for Double Jeopardy purposes. To deny that point, as the Government apparently seeks to do, is to deny the basic intent of the Sentencing Reform Act of 1984.

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JEFFREY S. PARKER

3401 North Fairfax Drive
Arlington, Virginia 22201
(703) 993-8055

Counsel for Petitioner
David M. Dale

December 6, 1993